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in the Supreme Court of the United States

October Term, 1985

BISCAYNE 21 CONDOMINIUM, INC.,

Petitioner,

vs.

SOUTH ATLANTIC FINANCIAL CORP.

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER ON JURISDICTION

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No. 85-

IN THE

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October Term, 1985

BISCAYNE 21 CONDOMINIUM, INC.,

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vs.

SOUTH ATLANTIC FINANCIAL CORP.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the Opinion of the United States Court of Appeals for the Eleventh Circuit entered August 5, 1985; Petition for Rehearing denied on September 19, 1985.

OPINIONS BELOW

The Order of the United States Bankruptcy Court, Southern District of Florida denying Petitioner's Motion to File Proof of Claim Untimely, is dated September 1, 1983. It is not published and is set forth in the Appendix at page 38.

The decision of the United States District Court for the Southern District of Florida affirming the Order of the United States Bankruptcy Court is dated February 8, 1984, is not published and is set forth in the Appendix at page 32.

The decision of the United States Court of Appeals for the Eleventh Circuit affirming the Order of the district court is reported at 767 F.2d 814 (11th Cir. 1985) and is set forth in the Appendix at page 1.

JURISDICTION

The decision of the Court of Appeals for the Eleventh Circuit was entered on August 5, 1985. A timely Petition for Rehearing was denied on September 19, 1985, and this Petition for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §§1254(1) and 2101(c).

QUESTIONS PRESENTED

1. Whether the powers of the Bankruptcy Court to extend a Chapter 11 claims bar date fixed pursuant to

Federal Rule of Bankruptcy Procedure 3003(c)(3) must be read in conjunction with Rule 9006(b), even where "cause is shown", i.e., if the request for extension is made after the original time has expired, must "excusable neglect" be shown based upon the standard of Federal Rule of Civil Procedure 6(b)(2), and will an untimely filed notice of proof of claim not be treated as an amended proof of claim regardless of equitable factors?

2. Whether this Court's opinion in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) held 28 U.S.C. §1471 unconstitutional in its entirety?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

A. U.S. Const. art. III, §1 provides:

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme Court and the inferior courts, shall hold their offices during good behavior, and shall, at stated times receive for their services, a compensation, which shall not be diminished during their continuance in office.

B. 28 U.S.C. §1334 provides:

The district courts shall have original jurisdiction, exclusive of the courts of the states, of all matters and proceedings in bankruptcy.

C. 28 U.S.C. §1471(a), (b), and (c) provide:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or

related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

D. Former Bankruptcy Rule 3001(b)(3) provides:

(3) Time for Filing. A proof of claim may be filed at any time prior to the approval of the disclosure statement unless a different time is fixed by the court on notice as provided in Rule 2002.

E. Bankruptcy Rule 3003(c)(3), effective August 1, 1983, provides:

(3) Time for Filing. The Court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed.

F. Bankruptcy Rule 9006(b)(1) provides:

(b) Enlargement. When by these rules or by a notice given thereunder or by order of a court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without application or notice

order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon application made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

STATEMENT OF THE CASE

The findings of fact of the opinion below are accurate. In re South Atlantic Financial Corp., 767 F.2d 814, 815-817 (11th Cir. 1985); App. 1-3 .

In 1979, the creditor, Biscayne 21 Condominium, Inc. (Biscayne), a condominium association, purchased a residential condominium, known as Biscayne 21, from the debtor, South Atlantic Financial Corporation (SAFCO), a Florida corporation engaged in real estate development. In 1981, Biscayne filed suit against SAFCO in the Florida circuit court alleging that SAFCO had breached its sales agreement with Biscayne by misrepresenting the condition of the condominium and by failing to make certain repairs to it. This litigation was pending when SAFCO filed a voluntary

petition for reorganization under Chapter 11 of the Bankruptcy Reform Act of 1978 (the Bankruptcy Code) in the Southern District of Florida and was stayed on October 13, 1982.

In December of 1982, SAFCO filed a schedule of claims and statement of financial affairs in the bankruptcy court, pursuant to Interim Bankruptcy Rule 1007(b). In that schedule, SAFCO listed Biscayne as a "disputed" creditor. On June 22, 1983, the bankruptcy court set August 4, 1983, as the last day ("bar date") for creditors whom SAFCO had listed in its schedule as disputed, contingent, or unliquidated to file proofs of claim. Biscayne received a copy of this order but did not file a proof of claim before the bar date. Biscayne's attorney did, however, file a

notice of appearance on July 1, 1983, in which she requested the court to forward her copies of all future pleadings and orders filed in the case.

On August 18, 1983, SAFCO requested the bankruptcy court to estimate certain contingent or unliquidated claims pursuant to section 502(c) of the Bankruptcy Code. 11 U.S.C. §502(c) (1982). Because Biscayne had not submitted a proof of claim by the bar date, SAFCO did not request the court to estimate its claim.

SAFCO, however, specifically stated in its application of August 18, 1983, that it was unable to properly prepare a disclosure statement or file its plan, until the other contingent claims were liquidated. Of those contingent claims, three involved condominium disputes fac-

tually similar to Biscayne's pending state litigation.

Upon receiving a copy of SAFCO's pleading, Biscayne's counsel became aware that Biscayne had failed to submit a proof of claim, and, on August 22, counsel requested the bankruptcy court to allow Biscayne to file an untimely proof of claim.

The court heard Biscayne's request on August 31. At that hearing, Biscayne's counsel readily admitted that her client had failed to submit a timely proof of claim solely because of attorney error: she explained that Biscayne had employed her after the Chapter 11 proceeding began and it was her impression that its previous attorney had filed a proof of claim. The court concluded that counsel's error on

assuming that her predecessor had filed a proof of claim on behalf of Biscayne did not constitute "excusable neglect," and it denied Biscayne's request to file an untimely proof. The court, however, explored the possibility of whether Biscayne had done anything in the reorganization proceeding that could be treated as the filing of an informal proof of claim; if so, the court could consider Biscayne's request as a motion to amend such proof of claim. After entertaining argument of counsel on this point, the court concluded that Biscayne's only prior activity in the case, the appearance of its attorney, could not be considered an informal proof of claim and that Biscayne's claim had been foreclosed. On September 21, Biscayne moved the court to reconsider

its ruling and to stay the Chapter 11 proceeding in the interim. This motion was denied on October 18.

On October 26, Biscayne appealed the bankruptcy court's September 1 and October 18 orders. Thereafter, it moved the district court to stay the Chapter 11 proceeding in the bankruptcy court pending its disposition of Biscayne's appeal.

In the district court Biscayne also claimed that the district court and the bankruptcy court were without subject matter jurisdiction of SAFCO's Chapter 11 proceeding, in light of the Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d. 598 (1982). Following a hearing, the district court entered an

order, dated February 8, 1984, affirming the bankruptcy court's orders and denying Biscayne's requested stay.

Biscayne appealed to the United States Court of Appeals for the Eleventh Circuit, which affirmed the district court's order. The Eleventh Circuit held as a matter of law that:

> Rule 9006(b) makes it clear that, when a party moves for an extension of time after the expiration of the time period, it must show that its failure to act before the court's deadline was the result of excusable neglect.

The appellate court held that the district court did not abuse its discretion in refusing to allow Biscayne to file a proof of claim because Biscayne did not advance any reason for failing to comply with the August 4 bar date that was not within its reasonable

control. The court of appeals also held that Biscayne's untimely proof of claim could not be accepted as an amended proof of claim despite equitable considerations.

In a footnote, the court of appeals rejected Biscayne's challenge to the jurisdiction of the bankruptcy court and the district court based upon this Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982).

REASONS FOR GRANTING THE WRIT

I.

AN AUTHORITATIVE NATIONWIDE STANDARD IS NEEDED TO GUIDE BANKRUPTCY COURTS IN DETERMINING WHETHER TO CONSIDER EQUITABLE FACTORS IN DETERMINING WHETHER TO TREAT AN UNTIMELY FORMAL PROOF OF CLAIM AS AN AMENDED PROOF OF CLAIM OR TO GRANT AN EXTENSION.

Under Chapter 11 of the Bankruptcy Code, only certain claimants are required to file proofs of claim in order to participate in a reorganization. Section 1111(a) of the Code, 11 U.S.C. §1111(a) (1982), provides that all claims listed by a debtor in its schedule of claims are deemed to be filed unless the debtor lists the claim as "disputed, contingent, or unliquidated." Because SAFCO listed Biscayne's claim as disputed, Biscayne was required to file a proof of claim by

the bar date; otherwise, it would be forever foreclosed from participating in SAFCO's reorganization.

Although the Bankruptcy Code informs us as to which creditors must file proofs of claim in order to participate in a reorganization, it is silent as to the time within claims must be filed. This subject is covered by the Bankruptcy Rules. Rule 3003(c)(3), effective August 1, 1983, governs the time for filing claims in Chapters 9 and 11 cases, and provides:

> (3) Time for Filing. The Court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. [Emphasis added].

The court of appeals erroneously held that Rule 3003(c)(3) must be read in conjunction with Rule 9006(b) which provides:

> When an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if the request therefore is made before the expiration of the period originally prescribed or as extended by previous order or (2) on motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect. [Emphasis added]. App. 9 .
>
> The court below held that:
>
> Rule 9006(b) makes it clear that, when a party moves for an extension of time after the expiration of the time period, it must show that its failure to act before the court's deadline was the result of excusable neglect.

767 F.2d. at 817; App. 9-10 .

The court below utterly failed to look to the legislative history of Rule 3003(c)(3). The predecessor to Rule

3003(c)(3) was Rule 3001(b)(3) which stated:

> (3) Time for Filing. A proof of claim may be filed at any time prior to the approval of the disclosure statement unless a different time is fixed by the court on notice as provided in Rule 2002. [Emphasis added.]

Here, the Bankruptcy Court fixed the time of filing as the same date originally scheduled for the hearing on the Disclosure Statement. Of significance here is the fact that the bankruptcy court entered its Bar Date Order prior to August 1, 1983.

In the Note following former Rule 3001, it is stated that Rule 3001(b)(3) is adapted from Rule 10-401.

The Advisory Committee's Note to Rule 10-401 emphasizes that the intention and purpose for allowing Bankruptcy judges discretion to enlarge the time

for filing pursuant to Rule 9006(b)(1) (formerly 906(b)), is to further the policy of preserving rather than forfeiting rights such as those sought by Biscayne.

The Court below felt constrained from applying equitable principles to the facts, 767 F.2d. at 817; App. 1-24, despite this Court's edic in the landmark case of Pepper v. Litton, 308 U.S. 295, 304-305, 60 S.Ct. 238, 84 L.Ed. 281 (1939), wherein this Court enunciated the equity powers of the bankruptcy courts as follows:

> This court has held that for many purposes courts of bankruptcy are essentially courts of equity, and their proceedings are inherently proceedings in equity.
>
> The bankruptcy courts have exercised these equitable powers in passing on a wide range of problems arising out of the administration of bankruptcy estates. They have been invoked to the end that

> fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done.

The court of appeals below, in failing to find that excusable neglect existed as defined by the case law governing Federal Rule of Civil Procedure 6(b)(2), did not even consider the equities in order to determine whether cause was shown why Biscayne's proof of claim should be allowed to be filed untimely.

The court below did not even look at the circumstances in regard to whether an amendment to an imperfect claim could be allowed.

The better reasoning found in In re Modular Engineering Corp., 41 B.R. 52 (Bankr.S.D.Tx. 1984) was rejected by the

Court below. 767 F.2d at 820 n.7.; App. 29-30. In In re Modular, the bankruptcy court allowed a creditor in a Chapter 11 proceeding to file an amended proof of claim, even though it had filed nothing in the bankruptcy court apprising that court of the existence, nature, or amount of its claim, because the creditor, in a prior aribtration proceeding between it and the debtor, had set out its claim against the debtor, and made demands upon the debtor and evidenced its intent to hold the debtor liable. In that case no prejudice resulted to the debtor because, as is the case here, the debtor was fully aware of the existence of the claim.

The Eleventh Circuit, distinguished the applicability of In re Modular based upon the debtor's actual intent and

attempt in that case to deliver that claim to the trustee or debtor-in-possession. 767 F.2d at 820 n.7.; App. 29-30.

In contrast, the Eleventh Circuit accepts the doctrine that where a "creditor intended to file its proof of claim with the bankruptcy court but erroneously delivered it to the trustee or debtor-in-possession "it will be treated as having been timely filed with the bankruptcy court." 767 F.2d at 820 n.7; App.29-30; In re International Horizons, Inc., 571 F.2d 1213, 1218 (11th Cir. 1985).

Logic dictates that the same result should obtain by reason of inadvertent failure of counsel to file the proof of claim in the proper court, where, instead, a Notice of Appearance has been

properly filed and where the debtor-in-possession has actual knowledge of the scope and nature of the claim derived from protracted state court litigation.

The court in In re Modular Engineering Corp., 41 B.R. 52 (Bankr.S.D.Tx. 1984) did not fail to recognize the "misdelivery" doctrine, as suggested by the court below, but rather In re Modular extended logic and principals of equity to harmonize the field of jurisprudence.

The purpose of determining the allowance of an amended proof of claim is not to punish counsel, but rather to determine whether the debtor had notice of the existence, the nature and extent of the claim against him notwithstanding the absence of a specific form document entitled "proof of claim".

Here, the debtor had full knowledge of the nature and extent of Biscayne's claim based upon the state court proceedings which were automatically stayed by the initiation of the bankruptcy court proceedings.

The decision below would seem to hold that if Biscayne's attorney had, for example, inadvertently mailed a proof of claim to the home of the debtor or debtor-in-possession, and had not discovered the mistake until eighteen (18) days after the bar date set by the bankruptcy court had passed, that an amendment to that proof of claim would be allowed. On the other hand, where, as here, the debtor was fully aware of the claim by virtue of litigation proceedings in state court, and proper notice of appearance was filed in the

bankruptcy matter that new counsel would be handling the matter since the debtor had changed forms, the opinion below prevents the creditor from pursuing its claim in the bankruptcy proceeding, merely because the form styled "Proof of Claim" reached the court eighteen (18) days after the bar date. There is virtually no distinction between the two situations described in the two preceeding paragraphs.

Therefore, the court of appeals erred in distinguishing the reasoning set forth under the similar factual situations considered by the courts in In re Modular Engineering Corp., 41 B.R. 52 (Bankr.S.D.Tx. 1984) and Fausett v. Murner, 402 F.2d 961 (5th Cir. 1968).

The question which must be decided by this court is whether the rules

governing the resolution of bankruptcy matters will be applied in an automatic and rigid manner, without consideration or defference to principals of equity. Here the bar date for filing proofs of claim was set on the same date as the hearing to consider the Disclosure Statements. This was standard procedure under former Bankruptcy Rule 3001(b)(3). That hearing was continued. Indeed, the petitioner filed its formal proof of claim on August 22, 1983, months before a final plan was filed by the debtor.

Thus, no prejudice had resulted to any party on the date that Biscayne's formal proof of claim was filed, even though it was eighteen (18) days after the technical bar date.

Just four days prior to Biscayne's formal filing, the debtor had filed an

Application To Fix Contingent And/Or Unliquidated Claims pursuant to §502(c) of the Bankruptcy Code. In that application, the debtor explained to the bankruptcy court that three disputed claims involving condominiums existed. All had claims factually similar to Biscayne's pending state court litigation. The debtor specifically advised the court that it was unable to properly prepare a disclosure statement or file its plan until these contingent claims were liquidated.

It would have caused no additional inconvenience, let alone prejudice, for the debtor to have included Biscayne's similar claim formerly filed four days later. Due to the court's adherence to rigid technical application of the rules without regard for equitable principals,

a windfall resulted to the debtor. The court below omitted the consideration of equitable factors in its determination of a standard for allowing amended proofs of claim.

The interpretation and application of nationwide bankruptcy procedures is of great importance and should be decided by this Supreme Court.

II.

WHETHER THIS COURT'S OPINION IN NORTHERN PIPELINE CONSTRUCTION CO. V. MARATHON PIPE LINE CO., 458 U.S. 50 (1982) HELD 28 U.S.C. § 1471 UNCONSTITUTIONAL IN ITS ENTIRETY, IS A FEDERAL QUESTION OF GREAT SIGNIFICANCE TO THE NATION'S BANKRUPTCY SYSTEM THAT HAS NOT BEEN, BUT WHICH SHOULD BE, DECIDED BY THE SUPREME COURT.

This petition addresses the polestar issue of the jurisdiction of the bankruptcy courts and district courts during that window in time after the stay of execution of judgment imposed in Northern Pipeline Construction Corp. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d. 598 (1982), expired on June 28, 1982, until Congress enacted legislation properly vesting jurisdiction in the bankruptcy courts. See, Pub.L. 98-353 [H.R. 5174], July 10, 1984, 98 Stat. 333, The Bankruptcy

Amendments and Federal Judgeship Act of 1984.

In a divided plurality decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) this Court voided the grant of jurisdiction contained in §241(a) of the Bankruptcy Reform Act of 1978. (hereinafter referred to as the "Reform Act") because the offensive provisions of the statute were not severable from the remainder. Section 241(a) of the Reform Act enacted, inter alia, 28 U.S.C. §§1471-1482. While the concurring justices did not agree with the plurality on the breadth of the issue presented, they nevertheless agreed with the result reached for the primary reason that the grant of authority in

question could not be severed from the remainder of §241(a).

Northern Pipeline came to the Supreme Court on the debtor's appeal of the dismissal of its adversary proceeding for breach of contract and warranty, misrepresentation, coercion and duress. The district court had dismissed the proceeding for lack of subject matter jurisdiction, stating that "Title 28 U.S.C. §1471 cannot be sustained as a valid exercise of Congress' power under Art I, §8, cl. 4 to establish a uniform bankruptcy law." Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 12 Bankr. 946, 956 (D.Minn. 1981). The district court held the whole of §1471 unconstitutional.

The four justices in the Northern

Pipeline plurality examined the scope of §241(a) of the Reform Act, which prescribes the full range of bankruptcy court jurisdiction in twelve sections labelled §1471 through §1482 and compiled under the heading "Chapter 90-District Court and Bankruptcy Courts." The plurality found that "§241(a). . .impermissibly removed most, if not all, of the 'the essential attributes of the judicial power' from the Art. III District Court, and. . .vested those attributes in a non-Art. III adjunct." 102 S.Ct. at 2879-80. Among the "essential attributes of the judicial power" which can be exercised only by judges with Article III protections are, for example, the power to conduct jury trials, see discussion at 102 S.Ct. at 2863, and the removal power with

respect to a case which is within the judicial power of the United States. See, Tennessee v. Davis, 100 U.S. 257 (1880). Removal to the bankruptcy courts is provided for in §1478, which was enacted as part of the single statute §241(a).

The plurality referred to §241(a) as a "single statutory grant of jurisdiction" in footnote 40 to its opinion as it explained further why the entirety of that statute was invalid:

> It is clear, that at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon. As part of a comprehensive restructuring of the bankruptcy laws, Congress has vested jurisdiction over this and all matters related to cases under title 11 in a single non-Art. III court, and has done so pursuant to a single statutory grant of jurisdiction. In these circumstances we cannot conclude that if Congress were aware

that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicatory structure intact with respect to other types of claims, and thus subject to Art. III constitutional challenge on a claim-by-claim basis. Indeed, we note that one of the express purposes of the Act was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes. See, H.R. Rep. No. 95-595, supra, pp. 43-48; S.Rep. No. 95-989, p. 17 (1978). Nor can we assume, as THE CHIEF JUSTICE suggests, post, at 2, that Congress' choice would be to have this case 'routed to the United States district court of which the bankruptcy court is an adjunct.' We think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art. III, in the way that will best effectuate the legislative purpose.

102 S.Ct. at 2880 n. 40.

The Supreme Court affirmed the decision of the lower court, see, 102 S.Ct. at 2880, that §1471(c) was invalid. The question remains whether the effect of the concurrence of the additional two justices was to invalidate all of §241(a). The unfinished task remains to determine whether §§1471(a) and (b) were not valid as a possible basis for bankruptcy jurisdiction in the district courts prior to the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984, supra.

Likewise the corrollary questions must be answered regarding the constitutional validity of the emergency local rule adopted by the Eleventh Circuit and the Southern District of Florida in the aftermath of Northern Pipeline, which permitted district courts to auto-

matically refer a bankruptcy action to the bankruptcy court.

The question of jurisdiction over bankruptcy matters has not been authoritatively answered by this court, although numerous circuit courts of appeals have addressed the issue. In the Matter of Colorado Energy Supply, Inc., 728 F.2d 1283 (10th Cir. 1984); In the Matter of UNR Industries, Inc., 725 F.2d 1111 (7th Cir. 1984); White Motor Corp. v. Citibank, 704 F.2d 254 (6th Cir. 1983); In re Adirondack Railway, 726 F.2d 60 (2d Cir. 1984); Oklahoma Health Services Federal Credit Union v. Webb, 726 F.2d 624 (10th Cir. 1984); Braniff Airways, Inc. v. CAB, 700 F.2d 214 (5th Cir.), cert. denied, 103 S.Ct. 2122 (1983); Pine Assoc. Inc. v. Aetna Casualty & Surety Co., 733 F.2d 208 (2d

Cir. 1984); Lindquist v. Metro Bank Bloomington, 730 F.2d 1204 (8th Cir. 1984); In re Hansen, 702 F.2d 728 (8th Cir.) cert. denied, ____U.S.____, 103 S.Ct. 3539, 77 L.Ed.2d 1389 (1983); Coastal Steel Corp. v. Tilghman Wheelabrator, 709 F.2d 190 (3rd Cir.), cert. denied, ___U.S.___, 104 S.Ct. 349, _____ L.Ed.2d _____ (1984). But see, Rhodes v. Stewart, 705 F.2d 159 (6th Cir.), cert. denied, ____ U.S. ____, 104 S.Ct. 427, _____ L.Ed.2d _____ (1983); c.f., In re Seven Springs Apartments, Phase II, 33 B.R. 458 (Bankr. N.D.Ga. 1983), rev'd and remanded, 11 B.C.D. 17 (N.D.Ga. 1983).

Where serious questions of federal jurisdiction exists affecting significant numbers of Americans, and particularly regarding the nation's court

system for resolving bankruptcy matters, this Court has not hesitated to remove uncertainty and injustice by granting review.

CONCLUSION

Based upon the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SHARON B. JACOBS, ESQUIRE
SHARON B. JACOBS, P.A.
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Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing Petition for Writ of Certiorari were furnished by United Sates Mail this _____ day of December, 1985, to Jeffrey L. Tanenbaum, Esquire, Weil, Gotshal & Manges, 767 Fifth Avenue, New York, New York, 10153, and to: Louis Phillips, Esquire, Chair, Official Equity and Security Holders Committee, Phillips and Phillips, P.A., 14 N.E. First Avenue, Suite 908, Miami, Florida 33132.

SHARON B. JACOBS, ESQUIRE

A P P E N D I X

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO.: 84-5165

IN RE SOUTH ATLANTIC FINANCIAL CORP., etc., Debtors.

BISCAYNE 21 CONDOMINIUM ASSOCIATION, INC.,

Plaintiff-Appellant,

v.

SOUTH ATLANTIC FINANCIAL CORP., etc.,

Defendant-Appellee.

_____/

Appeal From The United States District Court for the Southern District of Florida

_____

Before RONEY and TJOFLAT, Circuit Judges, and BROWN*, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

This is an appeal by a creditor in a Chapter 11 bankruptcy proceeding challenging an order of the bankruptcy court, affirmed by the district court,

precluding it from filing a proof of claim after the time fixed for the filing of proofs of claims had passed. We find no error and affirm.

I.

In 1979, the creditor, Biscayne 21 Condominium, Inc. (Biscayne) a condominium association, purchased a residential condominium, known as Biscayne 21, from the debtor, South Atlantic Financial Corporation (SAFCO), a Florida corporation engaged in real estate development. In 1981, Biscayne filed suit against SAFCO in the Florida circuit court alleging that SAFCO had breached its sales agreement with Biscayne by misrepresenting the condition of the condominium and by failing to make certain repairs to it. This litigation was pending when SAFCO filed a voluntary

petition for reorganization under Chapter 11 of the Bankruptcy Reform Act of 1978 (the Bankruptcy Code) in the Southern District of Florida and was stayed on October 13, 1982.

In December of 1982, SAFCO filed a schedule of claims and statement of financial affairs in the bankruptcy court, pursuant to an Interim Bankruptcy Rule 1007(b).[1] In that schedule, SAFCO listed Biscayne as a "disputed" creditor. On June 22, 1983, the bankruptcy court set August 4, 1983, as the last day ("bar date") for creditors whom SAFCO had listed in its schedule as disputed, contingent, or unliquidated to file proofs of claim. Biscayne received a copy of this order but did not file a proof of claim before the bar date. Biscayne's attorney did, however, file a

notice of appearance on July 1, 1983, in which she requested the court to forward her copies of all future pleadings and orders filed in the case.

On August 18, 1983, SAFCO requested the bankruptcy court to estimate certain contingent or unliquidated claims pursuant to section 502(c) of the Bankruptcy Code. 11 U.S.C. §502(c) (1982).[2] Because Biscayne had not submitted a proof of claim by the bar date, SAFCO did not request the court to estimate its claim. Upon receiving a copy of SAFCO's pleading, Biscayne's counsel apparently became aware that Biscayne had failed to submit a proof of claim, and, on August 22, counsel requested the bankruptcy court to allow Biscayne to file an untimely proof of claim.

The court heard Biscayne's request

on August 31. At that hearing, Biscayne's counsel readily admitted that her client had failed to submit a timely proof of claim solely because of her error: she explained that Biscayne had employed her after the Chapter 11 proceeding began and it was her impression that its previous attorney had filed a proof of claim.[3] The court concluded that counsel's error in assuming that her predecessor had filed a proof of claim in behalf of Biscayne did not constitute "excusable neglect", and it denied Biscayne's request to file an untimely proof. The court, however, explored the possibility of whether Biscayne had done anything in the reorganization proceeding that could be treated as the filing of an informal proof of claim; if so, the court could

consider Biscayne's request as a motion to amend such proof of claim. After entertaining argument of counsel on this point, the court concluded that Biscayne's only prior activity in the case, the appearance of its attorney, could not be considered an informal proof of claim and that Biscayne's claim had been foreclosed. On September 21, Biscayne moved the court to reconsider its ruling and to stay the Chapter 11 proceeding in the interim. This motion was denied on October 18.

On October 26, Biscayne appealed the bankruptcy court's September 1 and October 18 orders.[4] Thereafter, it moved the district court to stay the Chapter 11 proceeding in the bankruptcy court pending its diposition of Biscayne's appeal. Following a hearing,

the district court entered an order, dated February 8, 1984, affirming the bankruptcy court's orders and denying Biscayne's requested stay. This appeal followed.

II.

A.

Under Chapter 11 of the Bankruptcy Code only certain claimants are required to file proofs of claim in order to participate in a reorganization. Section 1111(a) (1982), provides that all claims listed by a debtor in its schedule of claims are deemed to be filed unless the debtor lists a claim as "disputed, contingent, or unliquidated." Because SAFCO listed Biscayne's claim as disputed, Biscayne was required to file a proof of claim by the bar date; otherwise, it would be forever foreclosed

from participating in SAFCO's reorganization.

Although the Bankruptcy Code informs us as to which creditors must file proofs of claim in order to participate in a reorganization, it is silent as to the time within which claims must be filed. This subject is covered by the Bankruptcy Rules.[5] Rule 3003(c)(3), which governs the time for filing claims in Chapters 9 and 11 cases, provides that "[t]he court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed." The bankruptcy court here fixed August 4, 1983, as the time by which proofs of claim were required to be filed in SAFCO's reorganization. Because Biscayne failed to file a proof of claim by that time, it was barred

from participating in SAFCO's reorganization unless it could establish sufficient grounds for the filing of a late proof of claim.

[1] Rule 3003(c)(3) authorized the court to extend the time for filing of a proof of claim for "cause shown." This rule must be read, however, in conjunction with Rule 9006(b) See In re O.P.M. Leasing Services, Inc., 35 B.R. 854, 864 (Bankr.S.D.N.Y. 1983); cf. In re Magouirk, 693 F.2d 948, 950 (9th Cir. 1982) Rule 9006(b) provides:

> when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expira-

> tion of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

(Emphasis added.) Rule 9006(b) makes it clear that, when a party moves for an extension of time after the expiration of the time period, it must show that its failure to act before the court's deadline was the result of excusable neglect.

Courts have interpreted "excusable neglect" under Rule 9006(b) and its identically worded predecessor, Rule 906(b), as requiring the movant to show that "'the failure to timely perform a duty was due to circumstances which were beyond the reasonable control of the person whose duty it was to perform.'" In re Gem Rail Corp., 12 B.R. 929, 931 (Bankr.E.D.Pa. 1981) (quoting In re Manning, 4 B.C.D. 304, 305 (D.Conn.

1978) Thus, in In re Underground Utility Construction Co., 35 B.R. 588 (Bankr.S.D.Fla. 1983), the court held that a creditor had failed to show "excusable neglect" for filing his claim three days after the bar date where the untimley filing was the result of his failure to mail his claim to the proper address. Similarly, in In re Oakton Beach & Tennis Club Real Estate Limited Partnership, 9 B.R. 201 (Bankr.E.D.Wisc. 1981), the court held that counsel's reliance on misinformation from a bankruptcy court clerk regarding his duty to file a proof of claim did not amount to excusable neglect; see also In re Construction & Maintenance, Inc., 32 B.R. 87 (Bankr.S.D.Ala. 1983), ("misunderstanding" between a creditor and its lawyers which caused its late

filing of a proof of claim did not amount to "excusable neglect"); In re Gem Rail Corp., 12 B.R. 929, 931 (Bankr.E.D.Pa. 1981) (creditor's failure to obtain records with which to file timely proof of claim was not excusable neglect where there was no showing by creditor that records could not easily have been obtained). Courts have been most willing to find excusable neglect where the movant failed to comply with the bar date because, through no fault of its own, it had no notice of that date. See, e.g., In re Loveridge, 2 B.C.D. 1597 (Bankr.D.Conn. 1977).

Although this circuit has not had occasion to construe excusable neglect under either Rule 9006(b)(1) or Rule 906(b), the definition of excusable neglect employed by the courts cited

above comports with this circuit's construction of excusable neglect under Fed.R.Civ.P. 6(b)(2), from which Rule 9006(b) and Rule 906(b) are derived. See Fed.R.Bankr.P. 9006 Rule 9006 advisory committee note, For instance, in McLaughlin v. City of LaGrange, 662 F.2d 1385, 1387-88 (11th Cir. 1981), cert. denied, 456 U.S. 979, 102 S.Ct. 2249, 72 L.Ed.2d 856 (1982), we held that the appellant had not demonstrated "excusable neglect" for failing to respond in a timely manner to a summary judgment motion when his only excuse for failing to do so was that his attorney was a solo practitioner with a busy schedule. See also Beaufort Concrete Co. v. Atlantic States Construction Co., 352 F.2d 460, 463 (5th Cir. 1965)[6] (district court did not abuse its

discretion in finding no excusable neglect where party offered no excuse for its failure to comply with the time requirement of Fed.R.Civ.P. 56(c)), cert. denied, 384 U.S. 1004, 86 S.Ct. 1908, 16 L.Ed.2d 1018 (1966). Accord Graham v. Pennsylvania Railroad, 342 F.2d 914, 915 (D.C.Cir. 1964) (counsel's unfamiliarity with new rule of civil procedure did not constitute excusable neglect), cert. denied, 381 U.S. 904, 85 S.Ct. 1446, 14 L.Ed.2d 286 (1965); Sherrod v. Piedmont Aviation, Inc. 516 F.Supp. 39, 41 n. 1 (E.D.Tenn. 1978) (excusable neglect not established where failure to act was due to "simple inadvertence or ... mistake regarding the content of the rules or unfamiliarity with them").

[2,3] Biscayne acknowledges that

its failure to file a timely proof of claim was not the result of anything beyond its reasonable control, such as lack of notice of the bar date, but was the result of its counsel's failure accurately to determine whether a proof of claim had already been filed, a fact she could easily have verified by an examination of the bankruptcy court records. Biscayne contends, nevertheless, that the bankruptcy court abused its discretion when it failed to find "excusable neglect" and allow Biscayne to file a late proof of claim, because such would not have prejudiced any of the other parties participating in SAFCO's reorganization. Whether a late filing by Biscayne would have prejudiced SAFCO, its shareholders, or othe creditors was not, however, a relevant

inquiry for the courts below. Although some courts have examined the prejudicial effect of a late filing in determining whether excusable neglect exists, see, e.g., In re O.P.M. Leasing Services, Inc., 35 B.R. 854, 866 (Bankr.S.D.N.Y. 1983) (construing excusable neglect under Rule 9006(b)(2)); In re Four Seasons Securities Laws Litigation, 493 F.2d 1288, 1290-91 (10th Cir. 1974) (construing excusable neglect under Fed.R.Civ.P. 6(b)(2)), this circuit, as we have noted above, has not done so when applying Fed.R.Civ.P. 6(b)(2); and Biscayne has given us no reason why we should construe excusable neglect under Rule 9006(b) any differently. Moreover, we believe that such a construction would do violence to the plain meaning of the language of

both Rule 9006(b) and Fed.R.Civ.P. 6(b)(2). Both rules extend the time for doing of an act where "the failure to act was the result of excusable neglect." It is clear from this language that the focus of these rules is on the movant's actions and the reasons for those actions, not on the effect that an extension might have on the other parties' positions.

Therefore, because Biscayne failed to advance any reason for failing to comply with the August 4 bar date that was not within its reasonable control, we hold that the bankruptcy court did not abuse its discretion in refusing to allow Biscayne to file a proof of claim eighteen days after the bar date. We turn then to whether the bankruptcy court erred in refusing to allow

Biscayne to file an amended proof of claim at that time.

B.

It is well established that a creditor need not timely file a letter perfect proof of claim before the expiration of the time fixed by the court for the filing of such and that "in a bankruptcy case, amendment to a claim is freely allowed where the purpose is to cure a defect in the clam as originally filed, to describe the claim with greater particularity or to plead a new theory of recovery on the facts set forth in the original claim." In re International Horizons, Inc., 751 F.2d 1213, 1216 (11th Cir. 1985). In re Commonwealth Corp., 617 F.2d 415, 420-21 (5th Cir. 1980); In re Imperial Sheet Metal, Inc., 352 F.Supp. 1149, 1154-55

(M.D.La. 1973). Before a court will allow a party to file an amended proof of claim, however, there must be something filed in the bankruptcy court capable of being amended. In re International Horizons, Inc., 751 F.2d at 1217; In re Sems Music Co., 24 B.R. 376, 380 (Bankr.M.D.Tenn. 1982). Thus, courts have held that knowledge by the debtor of the creditor's claim, standing alone, will not be a sufficient basis upon which to allow the filing of an amended claim, standing alone, will not be a sufficient basis upon which to allow the filing of an amended claim. In re International Horizons, Inc., 751 F.2d at 1217; Wilkens v. Simons Brothers, Inc., 731 F.2d 462, 465 (7th Cir. 1984). The mere filing of a document in the bankruptcy court prior to

the bar date will not, however, necessarily suffice as an informal proof of claim capable of amendment. To constitue an informal proof of claim, the document must apprise the court of the existence, nature and amount of the claim. Perry v. Certificate Holders of Thrift Savings, 320 F.2d 584, 590 (9th Cir. 1963); In re Vega Baja Lumber Yard, Inc., 285 F.Supp. 143, 144 (D.P.R. 1968); In re Pizza of Hawaii, Inc., 40 B.R. 1014, 1016 (Bankr.D.Hawaii 1984). In addition, it must evidence an intent on the part of the claimant to hold the debtor liable for that claim. In re International Horizons, Inc., 751 F.2d at 1218, In re Sems Music Co., 24 B.R. at 380; In re Guardian Mortgage Investors, 15 B.R. 284, 285 (Bankr.M.D.Fla. 1981). Finally, the

courts have universally held that the debtor's scheduling of a creditor's "disputed, contingent, or unliquidated" claim does not constitue an amendable proof of claim; to hold otherwise, would completely eviscerate the statutory requirement that such creditor file a formal proof of claim. See, e.g., In re Piggott, 684 F.2d 239, 245 (3d Cir. 1982); Hoos & Co. v. Dynamics Corp. of America, 570 F.2d 433, 439 (2d Cir. 1978); Perry v. Certificate Holders of Thrift Savings, 320 F.2d at 589.

Applying these principles, courts, have deemed an amendable proof of claim "filed" where, for example, the creditor, in applying to the court for relief from an automatic stay, set forth in great detail the nature of his claim, In re Guardian Mortgage Investors, 15 B.R.

284, 285-87 (Bankr.M.D.Fla. 1981), or the bankruptcy court was fully informed as to the nature of the claim because the claim had been in litigation before the court for several months. In re Pizza of Hawaii, Inc., 40 B.R. at 1016. See also Sun Basin Lumber Co. v. United States, 432 F.2d 48, 50 (9th Cir. 1970).[7] Conversely, courts have not allowed a creditor to file an amended proof of claim where the creditor had done nothing more than telephone the trustee in bankruptcy and apprise him of its claim, In re Pigott, 684 F.2d at 244, or where the trustee had knowledge of a federal district court suit between the creditor and the debtor but the creditor had done nothing in the bankruptcy court to apprise that court of its claim. In re Vega Baja Lumber Yard,

Inc., 285 F.Supp. at 146.

[9] This case law makes it clear that SAFCO's knowledge of Biscayne's claim, SAFCO's listing of Biscayne as "disputed" creditor in its schedule of claim and statement of financial affairs, and Biscayne's state court litigation with SAFCO did not provide the bankruptcy court a sufficient basis for allowing Biscayne to file an amended proof of claim. The only question before the courts below, therefore, was whether the notice of appearance, filed by Biscayne's attorney, constituted an amendable proof of claim.

The notice of appearance requested only that the bankruptcy court forward counsel's copies of all future pleadings filed in the Chapter 11 proceeding. It did not provide the bankruptcy court

with any information as to the existence, nature, or amount of Biscayne's claim against SAFCO. Nor did it, in any way, evidence an intent on the part of Biscayne to hold SAFCO liable for that claim. As SAFCO has correctly pointed out, a notice of appearance might be filed by an attorney for a variety of reasons. An attorney might "appear" in a case, for example, for no other purpose than to monitor the progress of the proceeding. In short, there is nothing in the filing of a notice of appearance which, in itself, puts a bankruptcy court on notice that the party for whom the attorney is appearing has a claim against the debtor, much less the nature or amount of any such claim. The bankruptcy court did not err in refusing to treat coun-

sel's notice of appearance as an amendable proof of claim by Biscayne, and its decision, as well as that of the district court, is, accordingly

AFFIRMED.

FOOTNOTES BY THE COURT

[1] Rule 1007(b) provided:

> (b) List of Creditors and Equity Security Holders. The debtor shall file with the court (1) a list of the debtor's creditors of each class, showing the amounts and character of their claims and securities and, so far as known, the name and address or place of business of each creditor and a statement whether the claim is disputed, contingent or unliquidated as to amount, and (2) a list of the debtor's equity security holders of each class showing the number and kind of interests registered in the name of each holder, and the last known address or place of business of each holder.

[2] Section 502(c) provides:

> (c) There shall be estimated for purpose of allowance under this section-
> (1) any contingent or unliquidated claim, fixing or liquidation of which, as the case may be, would unduly delay the closing of the case; or
> (2) any right to an equitable remedy for breach of performance if such breach gives rise to a right of payment.

[3] Biscayne's attorney did not state, and the record does not otherwise indi-

cate, the date Biscayne employed her to represent it in the Chapter 11 reorganization proceeding. What the record indicates is what we have recited in the text supra: that counsel noticed her appearance for Biscayne on July 1, 1983, 9 days after the court's order setting the August 4 bar date; that Biscayne had received a copy of that order and that counsel requested the court to furnish her copies of all pleadings and orders filed thereafter. It is not disputed that Biscanye's new counsel knew that the August 4 bar date had been set; what she did not know, according to her subsequent representation to the court, was that her predecessor had not filed a proof of claim in behalf of Biscayne.

[4] In the district court Biscayne also claimed, as it does here, that the district court and the bankruptcy court were without subject matter jurisdiction of SAFCO's Chapter 11 proceeding, in light of the Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). Biscayne argues that the Northern Pipeline decision held 28 U.S.C.A. §1471 (West.Supp. 1984) unconstitutional in its entirety. It also argues that the emergency local rule, adopted by the Eleventh Circuit and the Southern District of Florida in the aftermath of Northern Pipeline, which permitted district courts automatically to refer a bankruptcy action to the bankruptcy court, was unconstitutional.

Recently, in In re Committee of Unsecured Creditors of F S

Communications Corp., 760 F.2d 1194 (11th Cir. 1985) we held that the Supreme Court in Northern Pipeline only struck down as unconstitutional 28 U.S.C.A. §1471(c), the jurisdictional grant of power to the bankruptcy courts; it did not disturb 28 U.S.C.A. §§1471(a) and (b) which granted subject matter jurisdiction of bankruptcy matters to the federal district courts. We also held that the Northern District of Georgia's emergency rule, identical to the local rule operative in this case, which allowed the district court automatically to refer bankruptcy actions to bankruptcy courts, was constitutional. Our decision in that case accords with those of every other circuit that has ruled on this issue. E.g., Lindquist v. Metropolitan Bank of Bloomington, 730 F.2d 1204, 1205 (8th Cir. 1984); Oklahoma Health Services Federal Credit Union v. Webb, 726 F.2d 624, 625 (10th Cir. 1984); Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd., 709 F.2d 190, 200 (3d Cir.), cert. denied, ___ U.S. _____ , 104 S.Ct. 349, 78 L.Ed.2d 315 (1983). We therefore reject Biscayne's argument that the courts below acted in an absence of jurisdiction.

[5] The present bankruptcy rules went into effect on August 1, 1983, replacing the interim local rules adopted by the bankruptcy court of the Southern District of Florida. These rules, and not the interim rules, governed the filing of proofs of claim in this case.

[6] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en

banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[7] Biscayne cites Fausett v. Murner, 402 F.2d 961 (5th Cir. 1968), as requiring the reversal of the decisions in issue. Fausett, which held that the creditor could file an amended claim because the bankruptcy court was informed of the existence, nature and amount of the claim from its own files, is factually inapposite. Moreover, it appears that it has since been restricted to its particular circumstances. See In re International Horizons, Inc., 751 F.2d 1213 (11th Cir. 1985); In re Commonwealth Corp., 617 F.2d 415 (5thCir. 1980).

Additionally, Biscayne has forwarded to us, as supplemental authority, In re Modular Engineering Corp., 41 B.R. 52 (Bankr.S.D.Tex. 1984), in support of its position that the courts below should have allowed it to file an amended proof of claim. In In re Modular, the bankruptcy court allowed a creditor in a Chapter 11 proceeding to file an amended proof of claim, even though it had filed nothing in the bankruptcy court apprising that court of the existence, nature or amount of its claim, because the creditor, in a prior arbitration proceeding between it and the debtor, had set out its claim against the debtor, made demand upon the debtor, and evidenced its intent to hold the debtor liable.

Although, previously, courts, applying former Bankruptcy Rule 509(c)

and present Bankruptcy Rule 5005(b), have treated a proof of claim filed with a trustee or debtor-in-possession as having been filed with the bankruptcy court, they can only do so now when it is clear that the creditor intended to file its proof of claim with the bankruptcy court but eroneously delivered it to the trustee or debtor-in-possession. See also In re International Horizons, Inc., 751 F.2d at 1218. Because the court in In re Modular failed to recognize this "misdelivery" requirement of Rule 5005(b), we reject its holding and find, consequently, that it lends no support to Biscayne's position.

* Honorable John R. Brown, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5165

IN RE: SOUTH ATLANTIC FINALCIAL CORP., etc.,

Debtor.

SOUTH ATLANTIC FINANCIAL CORP., etc.,

Debtor-Appellee,

versus

BISCAYNE 21 CONDOMINIUM ASSOCIATION, INC.,

Creditor-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING
(September 19, 1985)

Before RONEY and TJOFLAT, Circuit Judges, and BROWN*, Senior Circuit Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in this above entitled and numbered cause be and the same is

hereby denied.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

* Honorable John R. Brown, U.S. Circuit Judge for the Fifth circuit, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No.: 83-2982-Civ-CA

IN RE SOUTH ATLANTIC FINANCIAL CORP.,

Debtor,

BISCAYNE 21 CONDOMINIUM, INC.,

Appellant,

v.

SOUTH ATLANTIC FINANCIAL CORP.

Appellee.

---/

ORDER AFFIRMING
BANKRUPTCY COURT ORDERS

Biscayne 21 Condominium Association, Inc. ("Biscayne 21") appeals the bankruptcy court orders which denied Biscayne 21's application to file a proof of claim untimely, motion for rehearing of the application and motion for stay of proceeding pending rehearing

of the application. Upon review of the briefs and the bankruptcy court record and upon consideration of the arguments of counsel presented at the February 8, 1984 hearing, it is

ORDERED AND ADJUDGED that the bankruptcy court orders which denied Biscayne 21's application to file a proof of claim untimely, motion for rehearing of the application, and motion for stay of proceedings pending rehearing of the application are AFFIRMED.

The basis of the affirmance is as follows:

1. Biscayne 21 never filed an informal proof of claim before the August 4, 1983 bar date. The notice of appearance filed by counsel for Biscayne 21 and debtor South Atlantic Financial

Corp.'s ("SAFCO") knowledge of Biscayne 21's claim does not constitute the filing of an "informal claim". Cf. In re Green, 33 B.R. 1007, 1009 (D.R.I. 1983) (". . . mere listing of a creditor's claim in the debtor's schedule is an inadequate basis for a belated 'amended' proof of claim . . . ." The creditor's submission of claim documentation to the trustee before the bar date does not constitute an informal claim.) Therefore, the equity standard for amendment of an "informal claim" is not applicable here because Biscayne 21 did not file an "informal claim."

2. Bankruptcy Rule 9006(b)(1) provides the dispositive standard for analysis of Biscayne 21's failure to file a timely proof of claim. Upon motion made after expiration of the period within

which an act must be performed, a bankruptcy court may enlarge the period for performance if "excusable neglect" caused a party to fail to act within the period. See Bankr. R. 9000(b)(1)(sic); see also former Bankr. R. 906(b). A party requesting an enlargement of time bears the burden of demonstrating "excusable neglect." See In re Maqouirk, 16 B.R. 883, 884 (B.A.P. 9th Cir. 1982); In re Gem Rail Corp., 12 B.R. 929, 931 (Bankr.E.D.Pa. 1981). "Excusable neglect" means "the failure to timely perform a duty due to circumstances which were beyond the reasonable control of the person whose duty it was to perform." In re Manning, 4 B.C.D. 304, 305 (Bankr.D.Conn. 1978); see Maqouirk, 16 B.R. at 885; Gem Rail, 12 B.R. at 931.

Biscayne 21 has not satisfied its burden. Biscayne 21 was aware of the August 4, 1983 bar date. Biscayne 21 had complete access to the bankruptcy court record of the SAFCO matter. Counsel for Biscayne 21 failed to review the record before the bar date to verify its belief "that a proof of claim had been filed." This failure to verify does not constitute "excusable neglect."

3. The question of prejudice is not material to resolution of the "excusable neglect" issue.

4. The Emergency Rule promulgated by the United States District Court for the Southern District of Florida is constitutional. Circuit Courts have upheld emergency rules similar to the Southern District Rule. See In re Hansen, 704 F.2d 728 (8th Cir.), cert.

denied, 103 S.Ct. 3539 (1983); White Motor Corp. v. Citibank, N.A., 704 F.2d 254 (6th Cir. 1983); Braniff Airways, Inc. v. CAB, 700 F.2d 214 (5th Cir.), cert. denied, 103 S.Ct. 2122 (1983).

DONE AND ORDERED at Miami, Florida, this 8th day of February, 1984.

/s/
UNITED STATES DISTRICT JUDGE

cc: Sandy Karlan, Attorney
Jeffrey T. Tanenbaum, Esq.
Martin Genauer, Esq.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

No.: 82-01981-BKC-JAG

IN RE SOUTH ATLANTIC FINANCIAL CORP.,

Debtor,

ORDER DENYING APPLICATION TO FILE PROOF OF CLAIM UNTIMELY

Upon the "Application to File Proof of Claim Untimely" dated August 22, 1983 (the "Application") filed by Chaykin, Karlan & Jacobs on behalf of Biscayne 21 Condominium, Inc. ("Biscayne 21"), and upon the "Response of SAFCO to Application of Biscayne 21 Condominium, Inc. to File Proof of Claim Untimely", dated August 29, 1983, and a hearing on the Application having been held on August 31, 1983, and after hearing Weil, Gotshal & Manges and Paul, Landy,

Beiley, harper & Metsch, P.A., co-attorneys to South Atlantic Financial Corp. ("SAFCO"), in opposition to the Application, and Chaykin, Karlan & Jacobs, attorneys for Biscayne 21, in support of the Application, and upon the record of this Chapter 11 case, and after due consideration of all evidence presented at the hearing, it is

ORDERED, FOUND, ADJUDGED AND DECREED:

1. Biscayne 21 is listed as a "disputed" creditor on the schedule filed by SAFCO with this Court under Interim Bankruptcy Rule 1007(b).

2. By order dated June 22, 1983, this Court set August 4, 1983 as the last date for filing proofs of claim in SAFCO's Chapter 11 case (the "Bar Order").

3. A copy of the Bar Order was sent

to all alleged creditors and shareholders of SAFCO, including Biscayne 21.

4. Biscayne 21 failed to file timely a proof of claim on or before August 4, 1983.

5. Pursuant to Bankruptcy Rules 3003(c)(3) and 9006(b)(1), this Court may extend the time to file a proof of claim where failure to act timely was the result of "excusable neglect."

6. Biscayne 21 has failed totally to establish "excusable neglect" in respect of its failure to file timely a proof of claim.

7. The Application is denied in all respects.

8. Biscayne 21 is forever barred from voting on a plan of reorganization or participating in a distribution of assets from SAFCO's estate.

DONE AND ORDERED at Miami, Dade County, Florida this 1st day of September, 1983.

/s/
UNITED STATES BANKRUPTCY JUDGE

DPA32u

Copies furnished to:

CHAYKIN, KARLAN & JACOBS
Attorneys for Biscayne 21
114 Giralda Avenue
Coral Gables, Florida 33134

UNITED STATES BANKRUPTY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

Case No.: 82-01981-BKC-JAG

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In re :

SOUTH ATLANTIC FINANCIAL :
CORP., etc.,
:

Debtor.
----------x

ORDER DENYING MOTIONS OF BISCAYNE 21 CONDOMINIUM, INC. FOR (1) REHEARING AND (2) STAY OF PROCEEDINGS PENDING MOTION FOR REHEARING

Upon the "Motion for Rehearng" and "Motion for Stay of Proceedings Pending Motion for Rehearing," each dated September 12, 1983 (collectively, the "Motions"), filed by Chaykin, Karlan & Jacobs on behalf of Biscayne 21 Condominium, Inc. ("Biscayne 21"), and upon the "Response of SAFCO to Motion of Biscayne 21 Condominium, Inc. for

Rehearing on Application to File Proof of Claim Untimely," dated October 5, 1983, and a hearing on the Motions having been held on October 7, 1983, and after hearing Chaykin, Karlan & Jacobs, attorneys for Biscayne 21, in support of the Motions, and Weil, Gotshal & Manges, co-attorneys to South Atlantic Financial Corp. ("SAFCO") and Schatzman & Schatzman, co-attorneys to SAFCO's Unsecured Creditors' Committee, in opposition to the Motions, and upon the record of this Chapter 11 case, and after due consideration of all evidence presented at the hearing, it is

ORDERED, FOUND, ADJUDGED AND DECREED:

1. Biscayne 21 has failed to establish any grounds for granting either of the Motions.

2. The Motions are denied in all

respects.

3. Biscayne 21 is forever barred from voting on a plan of reorganization or participating in a distribution of assets from SAFCO's estate.

DONE AND ORDERED at Miami, Dade County, Florida, this 18th day of October, 1983.

UNITED STATES BANKRUPTCY JUDGE